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IN THE

Supreme Court of the United States

OCTOBER TERM, 2007

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
NEW ENGLAND POWER COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER TOWN OF NORWOOD, MASSACHUSETTS, REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION

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I. *RES JUDICATA* DOES NOT JUSTIFY DENIAL OF THE WRIT

In its Petition Norwood demonstrated that a writ should issue to review the requirements of the Federal Power Act ("FPA")'s "just and reasonable" statutory provisions and the application of *res judicata*.[1] FERC's Opposition does not contest that FERC's ordered contract termination charge ("CTC") had to comply with the FPA's "just and reasonable" requirements (§§ 205-206, 16 U.S.C. §§ 824d-824e, Pet. App. 216a-223a), that under the Act sellers' costs are the main determinant of what is a "just and reasonable charge," or that New England Power Company ("NEP") suffered no or minimal costs from Norwood's service termination. It does not contest that FERC has recently been modifying its application of the "just and reasonable" provisions. FERC's main argument is that Norwood could have contested the CTC's justness and reasonableness in 1998 when FERC approved NEP's CTC tariff amendment filing. FERC thus argues that Norwood's claims are barred by *res judicata*.[2]

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[1] Abbreviations used herein are the same as those used in the Petition and in the Glossary, Pet. App. H.

[2] NEP's Opposition is likewise based on *res judicata*. NEP also argues that because the CTC was based on NEP's tariff rates before Norwood's termination, it must be considered "just and reasonable." NEP Opp. 19. Because NEP was selling its generating plant, which led to Norwood's contract termination, NEP's prior cost-of-service no longer had validity. NEP cannot and does not deny that by setting the CTC without taking into account the plant sales or the real market value of power, NEP charges Norwood for contract termination costs that NEP did not incur. NEP is correct that when NEP determined to restructure by selling its plant, Norwood challenged the restructuring and the applicability of the CTC to Norwood. Opp. 2-9. However, this other litigation did not establish the amount of the CTC or the validity of its components, both of which are at issue here. Finally, although NEP characterizes Norwood as not honoring its contract (Opp. 21), the issue here is the appropriate "just and reasonable" termination charge where Norwood ceased buying NEP wholesale power in the context of NEP's restructuring. The CTC tariff amendment provided for Norwood's contract termination. Pet. App. 280a.

FERC seeks to justify the first circuit affirmance of its orders, stating, "petitioner had been free in the original proceeding to argue 'that the tariff rates to be incorporated by the CTC were unreasonably high in light of what was known then about [New England Power's] costs' or otherwise to 'contest the CTC terms as unlawful....'" FERC Opp. 10, quoting *Town of Norwood v. FERC*, 476 F.3d 18, 26 (1st Cir. 2007), Pet. App. 1a-19a, 12a (brackets in original). Norwood could not have raised these issues in the original proceeding because FERC did not accept NEP's proposed CTC calculations for filing in that proceeding and did not consider the CTC components' justness and reasonableness. Pet. 6, 8-9.[3] FERC thus ignores the fact that it did not consider the CTC components or rates in the original proceeding and, in fact, set them for hearing in this case.

For *res judicata* to apply the prior action must allow consideration of the issue raised in the second case. Thus, the final judgment in both cases must be based upon the same cause of action. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001). *Res judicata* is triggered where in the first case "'the merits of [a party's] claim are in fact adjudicated [for or] against the [party] after trial of the substantive issues.'" *Id.*, quoting Restatement (Second) of Judgments § 19 cmt. a, 161 (1982) (brackets in *Semtek*). Nor will prior decisions be binding unless "both parties had a full and fair opportunity to argue their version of the facts." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). In this case, in the first action FERC accepted NEP's CTC formula tariff filing as a "generic" matter (Pet. 7-8, Pet. App. 240a), but neither accepted for filing nor decided the reasonableness of NEP's proposed contract termination charge or whether the formula components were

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[3] NEP's Opp., at 11, states correctly that Norwood sought to challenge to CTC on "just and reasonable" grounds, but NEP states incorrectly that "Petitioner had a full opportunity" to do so. NEP Opp. 10. FERC refused to consider the issue. Pet. 6-7 n.6; Pet. App. 273a-274a.

"just and reasonable." Pet. 6, 8-9, Pet. App. 120a-121a. *Because these matters were not at issue, Norwood could not have contested whether the formula costs were excessive or whether the components were reasonable.*

Contrary to FERC's Opposition at 9 and the court of appeals' opinion, 476 F.3d at 24, Pet. App. 10a, which the Opposition quotes, the main thrust of Norwood's appeal is *not* that the CTC formula is "'unlawful under the statute.'" It is that FERC's *application* of the formula is illegal. Because FERC had refused to review the reasonableness of the CTC rate and components earlier, it was required to review the application of the formula in this case, including whether the Revenue, Market and cap components could be just and reasonable when NEP no longer owned the plant whose costs are included in the Revenue factor and when the actual, *known* market prices for power belie any claim that NEP had properly calculated market prices.[4]

The 1998 case decided only that Norwood could terminate wholesale power purchases from NEP subject to its paying a yet-to-be-determined contract termination charge in accordance with a general formula. *Town of Norwood v. FERC*, 202 F.3d 392, 400 (1st Cir. 2000), Pet. App. 231a-255a, 240a-241a. The issue here — whether NEP's CTC formula *application*, including its interpretation and implementation, is "just and reasonable" — is not the same as the issue in the 1998 FERC case and appeal — whether a departing NEP customer must pay any CTC. *In the 1998 case the justness and reasonableness of the charge and its application was neither allowed nor decided.*

Moreover, significantly, neither FERC nor NEP contest Norwood's citation of *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir., 1987) (*en banc*) at Pet. 23 n.11, which denied preclusion in light of FERC's inherent ability to change policy and adjust to new facts and

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[4] FERC's statement in its Opposition, at 11 n.12, that Norwood is not raising these Revenue and Market factor claims is incorrect.

circumstances. *Accord, Port of Seattle, Wash. v. FERC*, No. 03-74139, slip op. at 10,426 (9th Cir. Aug. 24, 2007) ("*Port of Seattle*"). Even if there is an argument that *res judicata* could apply in these circumstances, certainly, FERC *could have considered* Norwood's claims that the CTC had to reflect NEP's sales of its generating plant that were used to serve Norwood and that market power rates were higher than the contract rate, especially where FERC had said that Norwood could later file a complaint to consider cost issues. Pet. App. 121a, 243a, 281a.[5] FERC's application of preclusion on the facts of this case was an abuse of discretion. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983). Thus, in addition to raising questions for Court review as to the appropriate statutory scope of "just and reasonable" requirements, this case raises important issues as to the appropriate scope of *res judicata* and of agency discretion to apply or not to apply the doctrine.

There are at least ten separate reasons why Norwood was intended to have an effective, subsequent opportunity to challenge the CTC components and charge and why FERC could not have decided Norwood's issues in 1998.

First, when NEP filed its 1998 CTC tariff amendment, NEP proffered its proposed CTC calculations. Although FERC accepted the generic CTC tariff amendment, it did not accept

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[5] There is disagreement among the circuits as to the rigidness with which *res judicata* should be applied in the agency context. *See, e.g., Napier v. Dir.*, 999 F.2d 1032, 1037 & n.7 (6th Cir. 1993) (enforcement of preclusion in the agency context must be "tempered by fairness and equity, in accordance with the beneficent purposes of the [underlying statute]" and "[r]igid application of administrative *res judicata* is inappropriate ... when such application would [require agency action] in violation of equity and good conscience," citing *United States v. Smith*, 482 F.2d 1120, 1123 (8th Cir. 1973) and *Purter v. Heckler*, 771 F.2d 682, 691 (3d Cir. 1985), respectively); *see also Artukovic v. INS*, 693 F.2d 894, 898 (9th Cir. 1982) ("in the administrative law context, the principles of collateral estoppel and *res judicata* are applied flexibly").

or approve the calculations. Pet. 6, 8-9. FERC could not have properly held (and at the time did not hold) that Norwood was required to contest a rate that FERC had not accepted for filing.[6]

Second, FERC also did not "accept[] the individual components of the CTC calculation" nor "approve[] the individual components used in NEPCO's calculation of Norwood's CTC...." Pet. App. 121a. Not having ruled on the components (*e.g.*, the Revenue Factor, Market factor and cap) in the tariff case, FERC was required to do so in this case so *res judicata* cannot apply.

Third, Norwood sought to litigate the justness and reasonableness of the charge in the first proceeding. Pet. 6-7 n.6; NEP Opp. 11-12. FERC refused to set the CTC amount for hearing, but said that Norwood could file a subsequent complaint. Pet. 6 & n.6; Pet. App. 281a. The court of appeals affirmed, stating: "FERC suggested in its initial order that Norwood could file a section 206 complaint ... challenging the substance of the contract termination charge, ... and presumably it can still do so." Pet. App. 243a; Pet. 7.

Fourth, regulatory agencies constantly apply general tariff language in later cases to obtain rates appropriate to the circumstances. *See Panhandle E. Pipe Line Co. v. FERC*, 777 F.2d 739, 741-742, 746-48 (D.C. Cir. 1985) (regulations exception allowed in part due to imprudency).

Fifth, tariff language may not be applied to reach unjustifiable results. *Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2002) (rejecting tariff provision interpretation that produced nonsensical result); *Fla. Mun. Power Agency v. FERC*, 411 F.3d 287 (D.C. Cir. 2005) (remanding refusal to consider customer-requested tariff rule

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[6] FERC's Opposition at 5, 6 emphasizes that Norwood estimated the CTC amount to be $78 million. Norwood certainly knew the amount that NEP claimed, but because FERC rejected NEP's attempt to file the amount, the amount was not before FERC and its validity *could not have been* at issue.

exception to charging for transmission for customer's entire load that the transmission provider could not provide). Because the CTC formula Revenue component includes the costs associated with NEP's generating plants (Pet. App. 25a, 60a; NEP Opp. 19), if NEP sells plant without reducing its Revenue factor, the CTC will include payment for plant which NEP has sold and has been paid.

Sixth, in approving the CTC, FERC left open an opportunity for Norwood to file a subsequent complaint. FERC concedes that there is an exception to *res judicata* where matters are left open for future adjudication. Opp. 12. It states that whether the matter at issue here was left open is a "factbound determination[]," but NEP shows no basis for concluding that the matter was not deferred. FERC Opp. 13.

Seventh, rejecting NEP's arguments, FERC set for hearing *in this case* the market value of the released Norwood power, the Revenue factor, the "fixed power supply costs relating to Norwood" and other cost issues. Pet. 8-9; Pet. App. 117a-119a (quotation at 118a), 120a-121a.[7] If these issues could not have been considered, there was no need for the hearing. Having set and held a full hearing as to the components and charge, FERC could not refuse to consider Norwood's contentions that the charge had no basis under the Act. *Port of Seattle*, slip op. at 10,418-19.

Eighth, although FERC maintains that issues involving the CTC's justness and reasonableness were decided at the time of NEP's filing, Order No. 888[8] (on which the CTC is based)

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[7] The Administrative Law Judge ("ALJ") found that a reduction to the R factor for plant sales was necessary "to ensure that the CTC charge is not unjust, unreasonable or unduly discriminatory as applied to Norwood." Initial Decision, *Town of Norwood v. Nat'l Grid USA*, 107 F.E.R.C. ¶ 63,041, P 62 (2005), Pet. App. 162a-163a. *Accord*, reducing the cap at PP 101-108, Pet. App. 187a-192a.

[8] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), [1991–1996 Regs. Preambles]

established a general stranded cost formula, which FERC applied in individual cases. Pet. 20-21 n.10. Further, FERC's May 15, 1998 Order states, "In its answer, NEPCO argues, *inter alia,* that its proposed CTC is consistent with Order No. 888...." Pet. App. 279a.[9] In cases implementing Order No. 888, FERC allows changes to reflect subsequent events and to achieve a just charge. Pet. 20-21 n.10. Order No. 888 recognized seller obligations to reduce stranded costs for generation sales. Order No. 888 at 21,659-60, [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. at 31,841-42. Nonetheless, FERC made no adjustment for plant sales in this case and the court below affirmed.

Ninth, this is an FPA complaint proceeding *where FERC had held that it had not previously approved the formula components as just and reasonable.* Pet. App. 21a, 120a-121a. If necessary, FERC was obligated to apply or even change the formula *to ensure a just and reasonable charge.*

Tenth, at issue is plant that has been sold, yielding NEP revenues, not costs. The first circuit's holding that FERC's approval of the CTC general formula allowed a CTC payment for plant that had been profitably sold sanctions an arbitrary and capricious result. Administrative Procedure Act § 10(e), 5 U.S.C. § 706, Pet. App. 228a-229a.

F.E.R.C. Stat. & Regs. ¶ 31,036, *clarified,* 76 F.E.R.C. ¶ 61,009 (1996), *modified,* Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048, *order on reh'g,* Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g,* Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC,* 535 U.S. 1 (2002).

[9] Apart from terminology differences, the stranded costs and CTC formulas are virtually the same; the CTC formula comes from the stranded cost formula. Pet. App. 275a-276a, 69a. Order No. 888 at 21,572-73, [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. at 31,839-40.

Norwood did not have a "full and fair opportunity" to argue its version of the facts of whether the approximately $72 million FERC-ordered CTC payment plus interest was "just and reasonable" in the first proceeding. *Utah Constr. & Mining*, 384 U.S. at 422; *Semtek*, 531 U.S. at 502. Further, *res judicata* does not apply because FERC and the court of appeals left open Norwood's right to challenge the payment on "just and reasonable" grounds. Pet. 20-21. However, a respected court of appeals found Norwood's claims barred. *Town of Norwood*, 476 F.3d at 24-26, Pet. App. 8a-13a. Whether, to what extent and under what standards courts of appeals may determine that agencies may avoid substantive statutory law on grounds of *res judicata* in spite of agencies never having reviewed the statutory issues warrants this Court's review. NEP's Opp. 13-14 discussing the court of appeals' restrictive interpretation of its earlier 2000 *Town of Norwood* decision supports allowing an earlier, arguably ambiguous, decision to foreclose consideration of matters entrusted to agency decision, thus permitting uncertainty, non-enforcement of important Congressional mandates, denials of party rights and unnecessary litigation.

Finally, at the same time that they argue that FERC's 1998 orders bar Norwood from contesting the unjustness and unreasonableness of the amount of the charge, FERC (Opp. 14-15) and NEP (Opp. 19) state that Norwood could have filed a complaint against the legality of NEP's underlying tariff rate before it terminated purchasing from NEP. The appropriate charge was at issue in this case. And, as this case illustrates, FERC would not have been willing to hear a complaint by a departing customer protesting the costs of power that a buyer will not purchase from plant that a seller has sold. Page 1 n.2, *supra*.

II. THE FIRST CIRCUIT AND NINTH CIRCUIT DECISIONS CONFLICT

A series of Ninth Circuit cases, most recently *Port of Seattle*, slip op. at 10,411, decided August 24, 2007 after

Norwood's petition was filed, have held that *all* FERC jurisdictional rates and charges must be "just and reasonable." *Id.*; *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053, 1057-59, 1074 (9th Cir. 2006), *petitions for cert. filed*, 75 U.S.L.W. 3610 (U.S. May 3, 2007) (Nos. 06-1457 and 06-1462) ("*P.U.D.*"); *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 474 F.3d 587, 590 (9th Cir. 2006), *petitions for cert. filed*, 75 U.S.L.W. 3610 (U.S. May 3, 2007) (Nos. 06-1454 and 06-1468) ("*P.U.C.*"); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012-13 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007) ("*Lockyer*"). These cases concern rates charged under contracts pursuant to *previously approved* market based rate tariffs or other market rate approvals. *Lockyer*, 383 F.3d at 1009; 1015; *P.U.D.*, 471 F.3d at 1056-57, 1073, 1077-85; *P.U.C.*, 474 F.3d at 591, 594. *See also Port of Seattle*, slip op. at 10,409-10, 10,411, 10,432-34 (concerning refunds for sales of capacity and energy generally under short-term, bilateral standard form power pool power contracts). The Ninth Circuit holds that when facts reveal that markets may have been subject to malfunction or manipulation, charges based on prior market rate authorizations must be reopened. *E.g.*, *Lockyer*, 383 F.3d at 1014-1018; *P.U.D.*, 471 F. 3d at 1077, 1085-87; *P.U.C.*, 474 F.3d at 595-96. Contrary to FERC's Opp., at 9, which states that the Ninth Circuit cases did not deal with preclusion, in *Lockyer* FERC itself (unsuccessfully) argued that petitioners were impermissibly attacking prior Commission orders approving sellers market-based tariffs.

The FERC Opp. at 13 treats the Ninth Circuit cases as "involv[ing] the reasonableness of rates under still-existing contracts." The cases, holding that prior approvals do not negate FERC's duty to ensure that rates are "just and reasonable," are in stark contrast with the First Circuit's affirmance of FERC's CTC on *res judicata* grounds because of its prior approval of the CTC tariff formula. The CTC tariff provision has no different legal status than the tariffs and prior FERC orders that were before the Ninth Circuit.

As *Lockyer* states: "If the ability to ... gauge the 'just and reasonable' nature of the [market-based tariff] rates is eliminated, then effective federal regulation is removed altogether." 383 F.3d at 1015. Finally, FERC argues (Opp. 12, 13-14) that unlike the rates before the Ninth Circuit, the CTC is a fixed formula charge.[10] Whether the CTC is deemed "fixed," a "rate" or a "charge," it provides for a $72 million payment plus interest that must be "just and reasonable."

CONCLUSION

The writ should be granted.

Respectfully submitted,

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[10] The Opposition makes much of its (and the court of appeals') contention that the CTC is a "'formula driven charge'" determined as of the time of contract termination. Ironically, formula rates typically adjust to cost and market changes. *E.g.*, *Ocean State Power II*, 69 F.E.R.C. ¶ 61,146, 61,545-46 (1994). However it is characterized, the CTC was required to meet the statutory test.